IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

CANAL INSURANCE COMPANY
Plaintiff

V. NO. 2:95CV156-B-A

J-LIN TRUCKING, INC., DUNLAP & KYLE COMPANY, INC., d/b/a GATEWAY TIRE AND SERVICE CENTER, HERMAN BENSON and JOHN DOES 1-5
Defendants

MEMORANDUM OPINION

This cause comes before the court upon the plaintiff's motion for summary judgment. The court has duly considered the parties' memoranda and exhibits and is ready to rule.

FACTS

This is a declaratory judgment action arising out of a single-vehicle accident involving the defendant Herman Benson. Benson was an employee of the defendant J-Lin Trucking, Inc. (hereinafter referred to as "J-Lin"). J-Lin was a small company which hauled dirt and sand in dump trucks to various work sites. Since J-Lin had less than five employees, it was not required to, and did not elect to maintain workmen's compensation insurance. However, J-Lin did maintain liability insurance on its dump trucks through the plaintiff, Canal Insurance Company (hereinafter referred to as "Canal"). Said insurance policy contained several exclusions regarding liability coverage. The relevant exclusions read as follows:

> Exclusions: This insurance does not apply:
>
> ...
>
> (b) to any obligation for which the insured or any carrier as his insurer may be held liable under any workmen's compensation, unemployment compensation or disability benefits law, or under any similar law;
>
> (c) to bodily injury to any employee of the insured arising out of and in the course of his employment by the insured or to any obligation of the insured to indemnify another because of damages arising out of such injury; but this exclusion does not apply to any such injury arising out of and in the course of domestic employment

by the insured unless benefits therefor are in whole or in part either payable or required to be provided under any workmen's compensation law.

On August 29, 1994, Benson was driving a J-Lin dump truck during the course of his employment when a tire blew, causing the truck to careen into a utility pole and catch on fire. As a result of said accident, Benson allegedly suffered severe and permanent injury. He subsequently filed suit in the Circuit Court of Coahoma County, Mississippi, against J-Lin and the other defendants listed herein. As to the defendant J-Lin, Benson asserted claims of negligence, including the failure to provide a safe place to work and a safe instrumentality. J-Lin placed Canal on notice of the claim, and requested that Canal provide a defense and indemnification. Canal denied coverage under the aforementioned exclusions. Canal then filed this action seeking a declaratory judgment as to its obligations to defend and indemnify under the liability portion of the policy.

LAW

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 275 (1986) ("the burden on the moving party may be discharged by 'showing'...that there is an absence of evidence to support the non-moving party's case"). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden shifts to the non-movant to "go beyond the pleadings and by...affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp., 477 U.S. at 324, 91 L. Ed. 2d at 274. That burden is not discharged by "mere allegations or denials." Fed. R. Civ. P. 56(e). All legitimate factual inferences must be made in favor of the non-movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 216 (1986). Rule 56(c) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322, 91 L. Ed. 2d at 273. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 552 (1986).

In support of its motion for summary judgment, Canal asserts that the aforementioned exclusions state that no coverage is provided for bodily injury sustained by an employee of the named insured arising out of or in the course of employment. Exclusion (b) only excludes coverage for any injury for which the named insured may be held liable under any workmen's compensation law. Since the named insured had less than five employees, it was not

subject to any liability under the Mississippi workmen's compensation statute. Miss. Code Ann. § 71-3-5 (1995). Therefore, exclusion (b) does not apply.

Exclusion (c) excludes coverage for bodily injury to any employee of the named insured arising out of and in the course of his employment. Since Benson's injury indisputably arose in the course of his employment, exclusion (c) would apply to preclude liability coverage under the policy. The defendants argue that exclusion (c) is ambiguous, and therefore must be construed against the author, Canal Insurance Company. However, the defendants fail to identify which term or terms they believe to be ambiguous. The court finds no portion of the exclusion to be doubtful as to its meaning or to be reasonably subject to more than one interpretation. Furthermore, the Mississippi Supreme Court, whose decisions we are Erie-bound to follow, has previously addressed a similar employment exclusion clause and found there to be no ambiguity. Benton v. Canal Ins. Co., 130 So. 2d 840 (Miss. 1961); see also Preferred Risk Mut. Ins. Co. v. Poole, 411 F. Supp. 429, 433-434 (N.D. Miss. 1976), aff'd, 539 F.2d 574 (5th Cir. 1976).

Exclusion (c) contains an exception to the exclusion, which states that exclusion (c) does not apply to any such injury arising out of and in the course of domestic employment, unless benefits are either payable or required to be paid pursuant to any workmen's compensation law. Although very few cases analyze a domestic employment exception to an employment exclusion clause, those that do address the issue find that the term "domestic employment" is unambiguous and carries its generally accepted meaning of services of a household nature in or about a private home. Canal Ins. Co. v. Earnshaw, 629 F. Supp. 114, 117-118 (D. Kan. 1985); Richoux v. Callais & Sons, Inc., 1987 WL 10457, *2-3 (E.D. La. 1987). This definition comports with the most prevalent definitions of "domestic" found in Webster's Third New International Dictionary and Black's Law Dictionary, and is recognized by the court as the commonly accepted meaning of the term "domestic employment." Since Benson was not engaged in the performance of household services at the time of the accident, the exception to the exclusion does not apply.

The defendants have asserted that if Canal legally denies liability coverage, then the policy's uninsured motorist provisions would provide coverage for Benson's claims. However, neither party raised the issue of uninsured motorist coverage in their pleadings, and Benson has not filed a claim for uninsured motorist benefits under the policy. Therefore, the issue of uninsured motorist coverage is not properly before the court.

The plaintiff further seeks summary judgment on J-Lin's counterclaim. However, J-Lin has requested that should the court grant summary judgment on the issue of liability coverage and decline to address the issue of uninsured motorist coverage, that

it's counterclaim be dismissed without prejudice so that it may be filed at a later time, if appropriate. The court will agree to dismiss J-Lin's counterclaim without prejudice, and therefore will not reach the merits of the plaintiff's motion for summary judgment on the issue of the counterclaim.

CONCLUSION

For the foregoing reasons, the court finds that the plaintiff's motion for summary judgment should be granted as to the issue of liability coverage and judgment entered in accordance therewith. The plaintiff's motion for summary judgment on the defendant's counterclaim should be denied and the counterclaim dismissed without prejudice.

An order will issue accordingly.

THIS, the _____ day of August, 1996.

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NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE